9 FAM 40.1
NOTES

(CT:VISA-2132; 06-25-2014)
(Office of Origin: CA/VO/L/R)

9 FAM 40.1 N1 VALIDITY OF "MARRIAGE" FOR IMMIGRATION PURPOSE

9 FAM 40.1 N1.1 Marriage and Spouse Defined

(CT:VISA-2079; 04-09-2014)

a. The term "marriage" is not specifically defined in the INA; however, the meaning of marriage can be inferred from the INA 101(a)(35) (8 U.S.C. 1101(a)(35)) which defines the term "spouse." A marriage, in order to be valid for immigration purposes, must be celebrated in the presence of both parties.

b. The underlying principle in determining the validity of the marriage is that the law of the place of marriage celebration controls (except as noted in paragraph c of this section). If the law is complied with and the marriage is recognized, then the marriage is deemed to be valid for immigration purposes. Any prior marriage, of either party, must be legally terminated.

c. Marriages, considered to be void under State law as contrary to public policy, such as polygamous or incestuous marriages, or which Federal law determines does not meet the Federal definition of a marriage, cannot be recognized for immigration purposes even if the marriage is legal in the place of marriage celebration.

d. A marriage void under state law, such as an underage or incestuous marriage, may nevertheless be recognized as valid by the state of intended immigration. The legal thresholds varies state by state. For example, first cousins may not marry in Michigan and such marriages in Michigan are considered void from their inception. M.C.L.A. 551.3 (2010). A 1973 ruling of the Michigan Supreme Court, however, found a marriage between first-degree cousins married in Hungary was nevertheless valid. Toth v. Toth, 50 Mich. App 150, 212 N.W.2d 812 (1973). The same principal applies in marriages of minors. In any cases where a Consular Officer determines suspects that a marriage may not be valid for immigration purposes, the officer should first contact the Office of Legislation, Regulations and Advisory Opinions Division (CA/VO/L/A) for an advisory opinion (AO).

9 FAM 40.1 N1.2 Cohabitation

(CT:VISA-1614; 01-07-2011)

In the absence of a marriage certificate, an official verification, or a legal brief verifying full marital rights, a common law marriage or cohabitation is considered to be a "valid marriage" for purposes of administering the U.S. immigration law only if:

(1) It bestows all of the same legal rights and duties possessed by partners in a lawfully contracted marriage; and

(2) Local laws recognize such cohabitation as being fully equivalent in every respect to a traditional legal marriage, e.g.:

(a) The relationship can only be terminated by divorce;

(b) There is a potential right to alimony;

(c) There is a right to intestate distribution of an estate; and

(d) There is a right of custody, if there are children.

9 FAM 40.1 N1.3 Proxy Marriage

9 FAM 40.1 N1.3-1 Consummated

(CT:VISA-1000; 09-03-2008)

For the purpose of issuing an immigrant visa (IV) to a "spouse," a proxy marriage that has been subsequently consummated is deemed to have been valid as of the date of the proxy ceremony. Proxy marriages consummated prior to the proxy ceremony cannot serves as a basis for the valid marriage for immigration purposes.

9 FAM 40.1 N1.3-2 Unconsummated

(CT:VISA-1165; 03-06-2009)

A proxy marriage, that has not been subsequently consummated, does not create or confer the status of "spouse" for immigration purposes pursuant to INA 101(a)(35). A party to an unconsummated proxy marriage may be processed as a nonimmigrant fiancé(e). A proxy marriage celebrated in a jurisdiction recognizing such marriage is generally considered to be valid, thus, an actual marriage in the United States is not necessary if such alien is admitted to the United States under INA provisions other than as a spouse. (See 9 FAM 41.81 N1.1.)

9 FAM 40.1 N1.4 Japanese or Korean Marriages

(CT:VISA-1000; 09-09-2008)

An alien is a "spouse" for immigration purposes if the marriage was lawfully entered into pursuant to the laws of Japan or the Republic of Korea through the filing of the required notification with the Ward Registrar and the parties:

(1) Were physically present together at the time of such filing;

(2) Consummated the marriage after such filing; or

(3) Had previously participated in a religious or private marriage ceremony and thereafter cohabited as man and wife.

9 FAM 40.1 N1.5 Uncle-Niece and First-Cousin Marriages

(CT:VISA-1985; 05-03-2013)

a. The determination of the status of a "spouse" in an uncle-niece or first-cousin marriage involves three variables:

(1) Laws of the place where the marriage took place;

(2) Laws of the State of proposed residence in the United States; and

(3) Facts that vary in each individual case.

b. Where you are faced with determining the validity of such a marriage for consular approval of a petition, the case must be considered "not clearly approvable" and submitted to the Department of Homeland Security/United States Citizenship and Immigration Services (DHS/USCIS) for approval. (See 9 FAM Appendix N 201 c). You must also ensure that the petition meets the appropriate requirements listed below before approving the petition. (See 9 FAM 42.41 N4.)

c. In cases where DHS/USCIS has approved a petition involving such a marriage, and you question its validity, but do not believe it necessary to return the petition directly to DHS/USCIS pursuant to 22 CFR 42.43, you should refer any questions concerning the validity of the petition to the Office of Legislation, Regulations and Advisory Opinions Division (CA/VO/L/A) for an advisory opinion (AO).

9 FAM 40.1 N1.6 Legal Separation Versus Marriage Termination

(CT:VISA-1000; 09-03-2008)

a. An alien is deemed a "spouse" for immigration purposes, even though the parties to the marriage have ceased cohabiting, as long as such marriage was

not contracted solely to qualify for immigration benefits. If the parties are legally separated, i.e., by written agreement recognized by a court, or by court order, the alien no longer qualifies as a "spouse" for immigration purposes even through the couple has not obtained a final divorce.

b. If an individual's prior marriage has been terminated by a separation that is not recognized by the state in which they reside, they must first obtain a divorce from the prior spouse in order to qualify for an immigrant visa (IV).

9 FAM 40.1 N2 CHILD DEFINED

(CT:VISA-1581; 10-04-2010)

The term "child" refers to an unmarried person under 21 years of age. For information on when an unmarried person over the age of 21 may meet the definition of child under the Child Status Protection Act (CSPA), please refer to 9 FAM 42.42 N12. This note addresses the many categories of the term "child" under the provisions of INA 101(b)(1), including the categories of 101(b)(1)(F) and (G), which are also addressed in 9 FAM 42.21.

9 FAM 40.1 N2.1 Child Born in Wedlock Under INA 101(b)(1)(A)

(CT:VISA-1000; 09-03-2008)

A child born to a married couple qualifies as the "child" of both individuals under INA 101(b)(1)(A).

NOTE: Section 101(b)(1)(A) of the INA no longer refers to "legitimate" children but rather to children "born in wedlock." Therefore, children born out of wedlock who are deemed "legitimate" by virtue of host country law would not qualify for "child" status under section 101(b)(1)(A), although they most probably would qualify for such status under section 101(b)(1)(C) or (D), depending on the terms of the local law and the facts of the case.

9 FAM 40.1 N2.2 Stepchild Relationship Under INA 101(b)(1)(B)

(CT:VISA-826; 07-20-2006)

The provisions of INA 101(b)(1)(B) provide for the creation of a step-relationship between the natural offspring (whether or not born out of wedlock) of a parent and that parent's spouse. Such step relationship is created as a result of the marriage of the offspring's natural parent to a spouse and must be based on a marriage that is or was valid for all purposes, including immigration purposes. The offspring must be or have been under the age of 18 at the time the marriage takes place in order to acquire the benefits as a child under INA 101(b)(1)(B). No

previous meeting of the offspring and the new parent is required. In addition, if the marriage between the natural parent and stepparent is still in effect (i.e., the marriage has not been terminated by divorce or by death of the natural parent), there is no requirement that an emotional relationship exist between the stepchild and stepparent.

9 FAM 40.1 N2.2-1 Out of Wedlock Child May Qualify as Stepchild

(CT:VISA-1000; 09-03-2008)

INA 101(b)(1)(B) makes no distinction between children born in wedlock and those born out of wedlock in respect to stepparent/stepchild relationship. All that is required is that the child be under the age of 18 at the time the marriage creating the status of stepchild occurred. A stepparent/stepchild relationship can also be established for children who were born subsequent to the marriage between the natural parent and the stepparent. For example, a child who is born as a result of an out of wedlock relationship between a married man and another woman would qualify as the stepchild of the married man's wife, since the child was under 18 when the marriage between the natural parent and the stepparent occurred.

9 FAM 40.1 N2.2-2 Stepparent/Stepchild Relationships After Termination of Marriage

(CT:VISA-1000; 09-03-2008)

a. A stepchild who has met the requirements to qualify as a "child" of the stepparent under INA 101(b)(1)(B) may continue to be entitled to immigration benefits from such marriage, even though the relationship between the natural parent and the stepparent has been terminated by divorce or by the death of the natural parent, provided the marriage was a valid marriage and the family relationship continues to exist as a matter of fact between the stepparent and stepchild.

b. The fact that the stepparent petitioner is willing to provide the required Form I-864, Affidavit of Support Under Section 213A of the Act is not by itself sufficient evidence that the family relationship continues to exist between the stepparent and the stepchild. There must be evidence of some form of contact (e.g., letters, electronic mail, telephone calls, etc.), though it is not necessary that the stepparent and stepchild have met in person.

9 FAM 40.1 N2.3 Child Born Out of Wedlock

9 FAM 40.1 N2.3-1 Qualification of Legitimated Child Under INA 101(b)(1)(C)

(CT:VISA-1000; 09-03-2008)

In order for a child to qualify under INA 101(b)(1)(C), the child must meet the following criteria:

(1) The child must be legitimated under the law of the child's residence/domicile or under the law of the father's residence/domicile;

(2) The father must establish that he is the child's natural father;

(3) The legitimation takes place before the child reaches the age of 18 years; and

(4) The child is in the legal custody of the legitimating parent or parents at the time of such legitimation. (For adoption purposes, legal custody maybe granted prior to the issuance of a decree.) (See 9 FAM 40.1 N2.4.)

9 FAM 40.1 N2.3-2 Qualification of a Child Under INA 101(b)(1)(D) Through the Mother

(CT:VISA-1000; 09-03-2008)

A child born out of wedlock is deemed to be the "child" of the natural mother under INA 101(b)(1)(D). The natural mother's name on the child's birth certificate may be taken as proof of such relationship.

9 FAM 40.1 N2.3-3 Qualification of a Child Under INA 101(b)(1)(D) Through the Father

(CT:VISA-1000; 09-03-2008)

a. A child born out of wedlock is deemed to be a "child" of the natural father under INA 101(b)(1)(D), provided the father has or had a bona fide parent-child relationship with the child. While an ongoing father-child relationship is not required to establish a "bona fide parent or child" relationship, you must ascertain whether a genuine parent or child relationship, not merely a tie by blood, exists or has existed at some point prior to the offspring's 21st birthday.

b. While each case must be determined based on the facts presented, you must be satisfied that the facts demonstrate the existence of a past or present parent or child relationship. For instance, although not necessary, the moral or emotional behavior of the father or child toward each other, which reflects the existence of such a relationship, may constitute favorable evidence of the relationship, just as cohabitation may be another element of evidence of such relationship.

c. Proof of present or former familial relationship may include the:

(1) Father's acknowledgment within the community that the child is his own;

(2) Father's support for the child's needs;

(3) Father's genuine concern for and interest in the child; and

(4) Parent-child relationship was established while the child was unmarried and under the age of 21.

9 FAM 40.1 N2.4 Adoption

9 FAM 40.1 N2.4-1 Qualification of Adopted Child Under INA 101(b)(1)(E)

(CT:VISA-1000; 09-03-2008)

a. In order to qualify as an adopted child under INA 101(b)(1)(E), a child must have been:

(1) Legally adopted while under the age of 16 years (or under the age of 18, if this is the sibling of a child adopted under 16 who meets the requirements of 101(b)(1)(E)); and

(2) In the legal custody of, and resided with, the adoptive parents for at least two years: provided, that no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status.

b. The legal custody requirement may be fulfilled either prior to or after the child's adoption. Legal custody is deemed official at the time the adopting parents are awarded custody of the child rather than on the date the adoption becomes final. If custody did not exist prior to adoption, a certified copy of the adoption decree constitutes proof of the custody requirement at least from the date on which it was issued.

c. The period of residence for which the adoptive parents and child have lived together must be:

(1) At least two years, prior to or after the adoption; the time frame in which the two years are accrued need not be continuous;

(2) The petitioning adoptive parents must have exercised primary parental control during the period in which they seek to establish compliance with the statutory two-year residence requirement:

(a) The adoptive parents must have evidence of control, especially in cases where the adopted child resided or continues to reside in the same household with the natural parents; and

(b) The evidence may include competent, objective evidence that the

adoptive parents have provided or are providing financial support and day-to-day care, and have assumed the responsibility for important decisions in the child's life.

d. A child adopted under the provisions of INA 101(b)(1)(E) is precluded from bestowing any benefit or privilege or status to the natural parents because of such parentage.

9 FAM 40.1 N2.4-2 Adopted Child of Single Person

(CT:VISA:566; 08-04-2003)

A child legally adopted by a single person may be considered a "child" within the meaning of INA 101(b)(1)(E), provided all the requirements of that section have been met.

9 FAM 40.1 N2.4-3 Illegitimate Child of Natural Father Pursuant to INA 101(b)(1)(F)

(CT:VISA-566; 08-04-2003)

See 9 FAM 42.21 N13.

9 FAM 40.1 N3 PARENT DEFINED

(CT:VISA-1000; 09-03-2008)

The term "parent," "father," or "mother" means a parent, father, or mother only where the relationship exists by reason of any of the circumstances listed in INA 101(b)(2), except for certain cases under 101(b)(1)(F), as noted in 9 FAM 42.21 N13.

9 FAM 40.1 N4 IMMIGRATION BENEFITS

9 FAM 40.1 N4.1 Immigration Benefits from Adult Children Only

(CT:VISA-1165; 03-06-2009)

Only U.S. citizens aged at least 21 years may confer immigration benefits on a parent or parents.

9 FAM 40.1 N4.2 Parents or Siblings of Adopted Child

9 FAM 40.1 N4.2-1 Biological Parents or Siblings

(CT:VISA-1165; 03-06-2009)

An adopted child (as defined in INA 101(b)(1)(E), (F) or (G)) may not confer immigration benefits upon a natural parent or sibling unless such adoption has been legally terminated. This is true even where the child never received an immigration benefit based on the adoption.

9 FAM 40.1 N4.2-2 When Adoption has been Terminated

(CT:VISA-1165; 03-06-2009)

A natural parent or child or sibling relationship can be recognized for immigration purposes following the termination of an adoption, if the petitioner can demonstrate that:

(1) No immigration benefit was obtained or conferred as a result of the adoptive relationship on the adoptive parent(s);

(2) A natural parent or child relationship meeting the requirements of INA 101(b) once existed;

(3) Any adoption that satisfied the requirements of INA 101(b)(1)(E) has been lawfully terminated; and

(4) The petitioner's natural relationship with the beneficiary has been reestablished, either through operation of law or through other legal process.

9 FAM 40.1 N4.3 Immigration Benefit Conferred from Child to Father

(CT:VISA-1165; 03-06-2009)

The Department of Homeland Security/United States Citizenship and Immigration Services (DHS/USCIS) has determined that an illegitimate child may confer immigration benefits to a father if:

(1) The father has established that he is the natural parent; and

(2) A bona fide parent or child relationship has been in existence prior to the child's 21st birthday. (See 9 FAM 40.1 N2.3-3.)

9 FAM 40.1 N5 SON OR DAUGHTER DEFINED

(CT:VISA-566; 08-04-2003)

The INA defines "son" or "daughter" as someone who has at any time met the definition of child in INA 101(b)(1).

9 FAM 40.1 N5.1 Illegitimate Child of Mother

(CT:VISA-1000; 09-03-2008)

An alien, who was born out of wedlock and is the son or daughter of a U.S. citizen or lawful permanent resident (LPR) mother is a "son" or "daughter" within the meaning of INA 203(a)(1) if the conditions of INA 101(b)(1)(C) (legitimation while in the mother's custody before reaching the age of 18) were met.

9 FAM 40.1 N5.2 Illegitimate Child of Father

(CT:VISA-1000; 09-03-2008)

An alien who was born out of wedlock and is the son or daughter of a U.S. citizen or lawful permanent resident (LPR) father is a "son" or "daughter" within the meaning of INA 203(a)(1) if the conditions of 101(b)(1)(C) (legitimation while in the father's custody before reaching the age of 18) or INA 101(b)(1)(D) (the father had a bona fide parent or child relationship prior to child's 21st birthday) were met.

9 FAM 40.1 N5.3 Stepson or Stepdaughter

(CT:VISA-566; 08-04-2003)

A stepson or stepdaughter is a "son" or "daughter" provided that the stepchild had not reached the age of 18 at the time the relationship was established.

9 FAM 40.1 N6 BROTHER AND SISTER DEFINED

(CT:VISA-1000; 09-03-2008)

Siblings who met the definition under the INA 101(b)(1) of a child of at least one common parent, are "brothers" or "sisters" within the meaning of INA 203(a)(4) and are eligible for preference under that provision. Siblings by virtue of a relationship that does not meet the criteria in INA 101(b)(1), such as stepsiblings based on a marriage that occurred after one of the siblings reached 18 years, are not siblings for the purposes of INA 203(a)(4).

9 FAM 40.1 N6.1 Brothers or Sisters of Half Blood With Same Mother

(CT:VISA-128; 10-20-1995)

Brothers or sisters who have the same mother but different fathers, including those born out of wedlock and not legitimated, are “brothers” or “sisters” within the meaning of INA 203(a)(4) and are eligible for preference status under this provision.

9 FAM 40.1 N6.2 Brothers or Sisters of Half Blood With Same Father

(CT:VISA-1000; 09-03-2008)

Brothers or sisters of half blood who have the same father but different mothers are eligible for preference under INA 203(a)(4) if both siblings qualified as a child under INA 101(b)(1).

9 FAM 40.1 N6.3 Stepbrother or Stepsister

(CT:VISA-1000; 09-03-2008)

A stepbrother or stepsister is a " brother" or " sister" within the meaning of INA 203(a)(4) only if both parties were under the age of 18 when the relationship was established.

9 FAM 40.1 N6.4 Adoptive Sister or Brother

(CT:VISA-1000; 09-03-2008)

An adoptive brother or sister of a U.S. citizen, who is at least 21 years of age, is eligible for preference status under INA 203(a)(4) if the adoptive sibling qualifies under INA 101(b)(1)(E).

9 FAM 40.1 N7 BASIS FOR "FOLLOWING TO JOIN"

9 FAM 40.1 N7.1 General

(CT:VISA-1581; 10-04-2010)

The term “following to join,” as used in INA 101(a)(27)(C) and INA 203(d), permits an alien to obtain a nonimmigrant visa (NIV) or immigrant visa (IV) and the priority date of the principal alien as long as the alien following to join has the required relationship with the principal alien. There is no statutory time period

during which the following to join alien must apply for a visa and seek admission into the United States. However, if the principal has died or lost status, or the relationship between the principal and derivative has been terminated, there is no longer a basis to following to join. As an example, a person would no longer qualify as a child "following to join" upon reaching the age of 21 years (unless they qualify for the benefits of the Child Status Protection Act, see 9 FAM 42.42 N12) or by entering into a marriage. There is no requirement that the "following to join" alien must take up residence with the principal alien in order to qualify for the visa. (See 9 FAM 42.42 N11.) The term "following to join," also applies to a spouse or child following to join a principal alien who has adjusted status in the United States.

9 FAM 40.1 N7.2 Spouse or Child Acquired Prior to Admission of Principal Alien

(CT:VISA-748; 06-30-2005)

A spouse or child acquired prior to a principal alien's admission to the United States is entitled to derivative status and the priority date of the principal alien, regardless of the period of time which may elapse between the issuance of a visa to or admission into the United States of the principal alien and the issuance of a visa to the spouse or child of such alien and regardless of whether the spouse or child had been named in the immigrant visa (IV) application of the principal alien.

9 FAM 40.1 N7.2-1 Child Born After Admission of Principal Alien

(CT:VISA-1000; 09-03-2008)

A child born of a marriage which existed at the time of the principal alien's admission to the United States is considered to have been acquired prior to the principal alien's admission and is entitled to the principal alien's priority date.

9 FAM 40.1 N7.2-2 Spouse or Child Acquired Subsequent to Admission of Principal Alien

(CT:VISA-128; 10-20-1995)

A spouse or child acquired through a marriage, which occurs after the admission of the principal alien under INA 101(a)(27)(C) or INA 203(a) through (c) is not derivatively entitled to the status accorded by those provisions.

9 FAM 40.1 N7.2-3 Adopted Child

(CT:VISA-41; 01-15-1991)

A child who qualified as a "child" under the provisions of INA 101(b)(1)(E) subsequent to the principal alien's admission, but was adopted and was a member

of the principal alien's household prior to the adoptive parent's admission to the United States, is considered to have been acquired prior to the principal alien's admission.

9 FAM 40.1 N7.2-4 Effect of Principal Alien's Naturalization on Derivative Status

(CT:VISA-1000; 09-03-2008)

A "following to join" derivative must immigrate to the United States prior to any naturalization as a U.S. citizen. If the alien fails to immigrate prior to any naturalization the citizen must file an immediate relative petition for the family members.

9 FAM 40.1 N8 FOREIGN STATE CHARGEABILITY OBTAINED FROM DERIVATIVE BENEFICIARY

(CT:VISA-2132; 06-25-2014)

a. An immigrant visa (IV) applicant may derive a more favorable foreign state of chargeability from an accompanying alien spouse under INA 202(b)(2). For instance, the beneficiary of a fourth preference petition, who was born in Mexico for which no fourth preference numbers are available and who is accompanied to the United States by the spouse who was born in a third country, may be issued a fourth preference visa chargeable to spouse country of nationality if fourth preference numbers are readily available for that country. In such cases, of same sex-marriage both partners, in a sense, are principal aliens. The spouse is the principal alien for the purpose of conferring a preference status and the partner is the principal alien for the purpose of conferring a more favorable foreign state chargeability.

b. The principles described in the paragraph above may apply in a case where one spouse benefits from the provisions of INA 212(g), while the other spouse may benefit, through the afflicted alien, from a more favorable foreign state chargeability, or special immigrant or preference immigrant status.

c. You must issue the visas simultaneously to the couples since neither party is allowed to precede the other spouse and both spouses must apply together for admission into the United States.

NOTE: *Consistent with the Supreme Court's decision in United States v. Windsor and guidance issued by the Department, a* same-sex marriage is now valid for immigration purposes, as long as the marriage is recognized in the "place of celebration*," whether entered into in the United States or a foreign country*. A same-sex marriage is valid for immigration purposes even if the couple intends ultimately to reside in one of the states that do not recognize same-sex marriages.

The same-sex marriage is valid even if the applicant is applying in a country in which same-sex marriage is illegal.

9 FAM 40.1 N9 AGGRAVATED FELONY DEFINED

(CT:VISA-1000; 09-03-2008)

a. The Immigration Act of 1990 (Public Law 101-649) amended the INA 101(a)(43). The amendments apply to all offenses committed on or after November 29, 1990, except for the language addressing illicit trafficking in any controlled substances and the proviso relating to offenses "in violation of federal or state law" or "in violation of foreign law."

b. The Immigration and Nationality Technical Corrections Act of 1994 (Public Law 103-416) greatly expanded the list of offenses that qualify as an aggravate felony under INA 101(a)(43) and is applicable to convictions entered on or after October 25, 1994.

c. The Omnibus Consolidated Appropriations, 1997 (Public Law 103-208) furthered the list of offenses that qualify as an aggravated felony under INA 101(a)(43)and clarified that the new definition applies to offenses, which occurred before, on, or after the date of the law's enactment.

d. An aggravated felony offense includes:

(1) Murder, rape, or sexual abuse of a minor;

(2) Illicit trafficking in any controlled substance;

(3) Illicit trafficking in any firearms, destructive devices, or explosive materials;

(4) Money laundering or engagement in monetary transaction in property derived from specified unlawful activity if the amount of funds exceeds $10,000;

(5) Certain offenses relating to explosive materials or firearms;

(6) Crimes of violence (not including purely political offenses) in violation of Federal or State law (or attempt or conspiracy to commit such act) for which the term of imprisonment at least 1 year;

(7) Theft (including receipt of stolen property) or burglary offense for which the term of imprisonment at least 1 year;

(8) An offense relating to the demand for or receipt of ransom;

(9) Child pornography;

(10) Offenses relating to racketeer-influenced corrupt organizations or relating to gambling offenses for which a sentence of one year imprisonment or more may be imposed;

(11) Offenses relating to owning, controlling, managing, or supervising the

prostitution business, if committed for commercial advantage;

(12) Offenses relating to peonage, slavery, or involuntary servitude;

(13) Offenses relating to gathering or transmitting national defense information or disclosure of classified information, sabotage, or treason;

(14) Offenses relating to protecting the identity of undercover agents;

(15) Fraud or deceit in which the loss to the victim or victims exceed $10,000;

(16) Tax evasion in which revenue loss exceeds $10,000;

(17) Alien smuggling for commercial advantage, except a first offense involving the alien's spouse, child, or parent, (see 9 FAM 40.65 Notes);

(18) Document fraud, counterfeiting, mutilating, or altering a passport except a first offense for which the alien has committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child or parent (and no other individual), for which the term of imprisonment is at least 12 months;

(19) Defendant's failure to appear for service of sentence if offense is punishable by imprisonment for a term of five years or more;

(20) Commercial bribery, counterfeiting, forgery, or trafficking in vehicles, the identification numbers have been altered for which the term of imprisonment is at least one year;

(21) Obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(22) Failure to appear before a court pursuant to a court order to answer to or dispose of a charge of felony if offense is punishable by imprisonment of more than two years; and

(23) Attempt or conspiracy to commit an offense in violation of Federal or State law or violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years.

9 FAM 40.1 N10 "ACTUALLY IMPOSED" DEFINED

(CT:VISA-1000; 09-03-2008)

The phrase "actually imposed" refers to the actual length of the sentence imposed by the court, including sentences that are imposed but suspended, and not the period of imprisonment served.

9 FAM 40.1 N11 "CONVICTION" DEFINED

(CT:VISA-826; 07-20-2006)

See 9 FAM 40.21(a) N3.1.

9 FAM 40.1 N12 DEFINITIONS UNDER THE USA PATRIOT ACT

(CT:VISA-1000; 09-03-2008)

DHS/USCIS has established the following definitions for the purpose of adjudicating applications under the USA Patriot Act (Public Law 107-56).

9 FAM 40.1 N12.1 Specified Terrorist Attack

(CT:VISA-860; 01-30-2007)

Section 428 of the Patriot Act defines "specified terrorist activity" as any terrorist activity conducted against the Government or people of the United States on September 11, 2001. This includes the attacks on the World Trade Center area and the Pentagon, as well as the crash of Flight 93 in Pennsylvania. It does not include the subsequent anthrax attacks or other previous or subsequent terrorist activities.

9 FAM 40.1 N12.2 Death

(CT:VISA-373; 03-19-2002)

To demonstrate that a person was killed in the terrorist attacks against the United States on September 11, 2001, the following may be used:

(1) Official death certificate listing the date of death as September 11, 2001, accompanied by other documents attributing the death to the attacks of September 11, 2001;

(2) Interim death certificate issued by the State of New York listing the date of death as September 11, 2001;

(3) Flight records for deceased passengers on one of the four planes used in the attacks;

(4) Public records listing the deceased as a victim of the September 11 attacks; or

(5) Other official or non-official documents.

9 FAM 40.1 N12.3 Disability

(CT:VISA-1000; 09-03-2008)

A licensed medical doctor or licensed psychiatrist must provide documentation that the physical or mental impairment of the principal applicant meets the definition of the term "disability" in section 12102(a)(2) of the Americans with Disability Act. A "disability" is defined as a "physical or mental impairment that substantially limits one or more of the major life activities of such individual."

9 FAM 40.1 N12.4 Loss of Employment

(CT:VISA-748; 06-30-2005)

a. The following may be used to demonstrate loss of employment due to the physical damage to, or destruction of, a business, which directly resulted from the terrorist attacks of September 11, 2001:

   (1) Letter from the employer;

   (2) Official records indicating that the business was completely destroyed; or

   (3) Other documentation showing the complete destruction of the business.

b. The Patriot Act notes that if the principal alien is able to continue in the employment of the business at a different location, after destruction on September 11, such an alien is not considered to have lost employment as a result of the September 11 attacks.

9 FAM 40.1 N12.5 Circumstances Preventing Timely Action in Applying For or Using Visas

(CT:VISA-1000; 09-03-2008)

DHS/USCIS has compiled a list of various events that aliens may use to support a claim for benefits under the USA Patriot Act:

(1) Office closures;

(2) Mail or courier service cessations or delays;

(3) Airline flight cessations or delays; or

(4) Other closures or delays affecting case processing or travel.

9 FAM 40.1 N13 USE OF "YOU" AND "WE" IN 9 FAM

(CT:VISA-748; 06-30-2005)

"You" in 9 FAM refers to consular officers and "we" refers to the Department. When any U.S. Government employee other than a commissioned Foreign Service consular officer is involved, we will specify the employment category in the text.